No. 330

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,676
CIVIL

ARKANSAS-MISSOURI POWER CORPORATION,
APPELLANT

vs.

MRS. CLARA K. PASCHAL, ADMINISTRATRIX OF THE ESTATE OF ROY G. PASCHAL, ET AL,
APPELLEES

APPEAL FROM THE
UNITED STATES DISTRICT COURT, WESTERN DIVISION, EASTERN DISTRICT OF ARKANSAS

PETITION FOR REHEARING

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

The Arkansas-Missouri Power Corporation, the appellant in the above entitled cause presents this its petition for rehearing in the above cause and in support thereof, respectfully shows:

1. That on May 3, 1957, the Court filed its Opinion in the above cause in favor of the appellees and against the appellant affirming the judgment of the United States District Court for the Western Division of the Eastern District of Arkansas.

2. That on May 3, 1957, judgment in pursuance of the said Opinion was entered.

3. The Court overlooked and failed to give any legal effect to the controlling issues and basic facts found by the Trial Court and accepted by this court, to wit:

(a) That the appellant issued and gave for property having a fair market value of $4,084,587.60 Preferred and Common Stock having respectively a fair market value of $680,313.60 and $994,830, and Bonds having a par value of $2,834,625. [See Findings 25 and 27 (R. 29-30)]. On pages 18-20 of its brief in chief the appellant cited a long list of authorities which demonstrated that the fair market value of the assets actually received by appellant for bonds having a par value of $2,834,625 was only $2,409,444 — $425,181 less than the par of the bonds.

(b) The Court, in holding that the bonds were not issued at a discount, overlooked the aforesaid facts that the amount actually received for the bonds was less than their par and failed to give any weight to a long list of authorities cited on pages 21 and 22 of appellant's brief in chief, and especially the holding of the Circuit Court of Appeals for the Third Circuit in *American Smelting and Refining Company* v. *U. S.*, 130 F. 2d. 883 (1942), wherein it was held that bonds were issued at a discount when issued and exchanged for property having a fair market value less than the par value of the bonds.

(c) The Court, in refusing to follow the American Smelting case and the long list of authorities cited on page 22 of appellant's brief in chief, with the assertion that the cited cases are distinguishable in their facts, overlooked the fact that there is no substantial difference in the facts here and those present in the cases cited.

(d) The Court, on page 9 of its opinion, held that the sale price of bonds on the open market has no bearing on whether they were issued at a discount. If, by this statement, the Court meant that the sale price on the open market was the basis of appellant's claim of discount, it overlooked appellant's contention that its claim of discount was based on the fact that the fair market value of the property received for the bonds was less than their par or maturity value. (See Appellant's Reply Brief, page 7.)

(e) The Court by its Opinion resolved the issues here involved into matters of first impression by holding in effect that discount can never arise on bonds issued in a reorganization under Sections 77A and 77B of the Bankruptcy Act.

(f) The Court overlooked the fact that its Opinion and the conclusion, that the bonds of appellant were not issued at a discount, are in hopeless conflict with the decision of the Court of Appeals of the Third Circuit in the *American Smelting Case*, Supra.

If, by the language of the Opinion, page 9, to the effect that the fair market value of the property of the bankrupt transferred to the appellant exceeded the fact value of its bonds, the Court meant that all of the difference between such value of the property and the aggregate of the fair market value of the stocks and the par value of the bonds should be charged against the stock and not allocated between the stock and bonds, the Court overlooked the rule universally applied in allocating a unit consideration to stocks and bonds in the case of *Hummel-Ross Fibre Corporation* v. *Commissioner*, 79 F. 2d. 474 (Fourth Circuit, 1935) and followed by a long list of authorities shown on pages 18-20 of Appellant's brief in chief; and further, the Court overlooked the fact that such a conclusion is in hopeless conflict with these authorities.

4. With due deference, the appellant insists that since the Court decided matters of first impression and because of the importance of the legal questions involved, this petition for rehearing should be considered by the Court *en banc* and upon such consideration a rehearing before the Court *en banc* be ordered. The appellant respectfully requests that such action be followed.

WHEREFORE, appellant prays that a rehearing be granted, that the judgment of the Court heretofore entered on May 3, 1957 be vacated, that the judgment of the District Court be reversed, and that the opinion of this Court be

modified to agree with the provisions of law, the controlling facts, and authorities set out in the foregoing petition for rehearing.

Respectfully submitted,

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CERTIFICATE

I, P. A. Lasley, of counsel for the appellant in the above styled cause, do hereby certify that upon careful examination of the opinion of the Court in this case, I verily believe that the facts stated and quoted in the attached petition for rehearing have been overlooked by the Court and that these facts are material; and I also verily believe that the Court has overlooked and failed to apply decisions and authorities set out in such petition which are controlling and which, if followed, would require a different judgment from that rendered and that the Court has erroneously misapplied controlling authorities and has drawn incorrect conclusions contrary to the positive facts.

Dated May 20, 1957.

P. A. LASLEY